

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

FRIDAY, THE 16TH NOVEMBER 2007 / 25TH KARTHIKA 1929

AS.No. 32 of 2001()

OS.422/1994 of ADDL.SUB COURT, ALAPPUZHA

APPELLANT:

**R.VAMAN SHENOY, S/O RAMASHENOY,
RESIDING AT ELUPARMBIL HOUSE,
40/3126, T.D. WEST, COCHIN - 35**

**BY ADV. SRI.S.K.BRAHMANANDAN
SRI.G.SREENIVASA PRABHU
SRI.S.B.PREMACHANDRA PRABHU**

RESPONDENTS:

- 1. R.KRISHNAKUMAR, S/O. RAMA SHENOY,
HOUSE No.27/7, PUTHEN MADOM,
WEST OF ARATTUKULAM, A.N. PURAM,
ALAPPUZHA.**
- 2. MEERA KRISHNAKUMAR, W/o. R.KRISHNAKUMAR,
RESIDING IN .DO. .DO.**
- 3. R.SURESH SHENOY, S/O.RAMA SHENOY,
RESIDING IN .DO. .DO.**
- 4. SUDHA SURESH SHENOY, W/o. SURESH SHENOY,
RESIDING IN .DO. .DO.**

R1 TO R4 BY ADV. SRI.B.JAYASANKAR

**THIS APPEAL SUITS HAVING BEEN FINALLY HEARD
ON 16/11/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

A.S.32/2001

:2:

ORDER ON C.M.P.No.200 OF 2001 IN A.S. No.32 OF 2001

DISMISSED.

16/11/2007

Sd/- K.PADMANABHAN NAIR,JUDGE

TRUE COPY

P.A.TO JUDGE

K.PADMANABHAN NAIR,J

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A.S.No.32 of 2001

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Dated this the 16th day of November, 2007

JUDGMENT

The plaintiff in O.S.No.422/94 of Additional Sub Court, Alappuzha is the appellant. The appeal is filed against the decree and judgment passed by the court below dismissing a suit filed by the appellant for declaration of title and mandatory injunction.

2. The following are the material averments: Plaintiff and defendants 1 and 3 are children of late Rama Shenoy. Second defendant is the wife of the first defendant. The 4th defendant is the wife of the 3rd defendant. The suit property is having an extent of 11½ cents comprised in Sy. No.624/1/66 of Mullakkal village which form part of 23 cents of land comprised in the said survey number. The entire property originally belonged to Madhava Shenoy. The property was given on lease to the ancestors of the plaintiff and defendants 1 and 3 and by successive devolution the lease hold right vested in Maddhava Shenoy, grandfather of the plaintiff and defendants 1 and 3. Madhava Shenoy died and the properties devolved upon his

widow and 3 children. They entered into a partition as per document No.2112/1966, dividing the property into four plots having 5.3/4 cents each. It was divided into four schedules. 'A' schedule which is situated in the North of the entire property was allotted to Rama Shenoy, the father of plaintiff and defendants 1 and 3. 5.3/4 cents of property situated just south of A schedule was allotted to Saraswathi Bai, the widow of Madhava Shenoy as D schedule, 5.3/4 cents property situated just south to D schedule was allotted to deceased Minna Rao as B schedule. The 5.3/4 cents property situated as the southern most portion of the item D property is described as C schedule and allotted to Narayana Shenoy. There is a building in the property and the same is situated in D and B schedule property. Saraswathi Bai, who obtained the D schedule property executed a gift deed in favour of the plaintiff as per document No.2113 dated 26.7.1966 and the plaintiff became absolute owner in possession and enjoyment of the same. The C schedule property which was allotted to Narayana Shenoy was later sold by him to strangers. After the partition the plaintiff, defendants and their mother were residing in the building situated in the property.

Minna Rao was also residing in the said house. The plaintiff was the only earning member of the family and the entire family was depending on his income for their livelihood. At the request of Minna Rao, plaintiff renovated the building, by spending more than Rs.10,000/- from his own earnings. The plaintiff was looking after the said Minna Rao, during his life time, who had no source of income. Deceased Minna Rao promised to give the B schedule property allotted to him to the plaintiff. Minna Rao died on 13.8.92. Rama Shenoy died in the year 1983. So the entire property of Minna Rao devolved upon Narayana Shenoy who was his brother. Narayan Shenoy sold his property he inherited from Minna Rao to the plaintiff as per sale deed No.55/93 dated 6.1.1993. According to the plaintiff by virtue of the gift deed executed by his grand mother he became the absolute owner of B schedule property and building portion. He claimed title and possession over the B schedule which was allotted to Minna Rao under the sale deed executed by Narayana Shenoy. Defendants 1 and 2 were residing in the building with the permission of the plaintiff and Minna Rao. Defendants 3 and 4 were also residing in the same building in one room with the

permission of the plaintiff. They had promised that they will vacate the portion of the building occupied by them whenever required by the plaintiff. The plaintiff had requested defendants 3 and 4 to vacate the premises and to give vacant possession of the same. Plaintiff issued a notice demanding vacant possession of the building. But the 3rd defendant did not surrender the possession of the building to the plaintiff. The plaintiff filed O.S.165/1993. Defendants 1 and 2 filed a written statement contending that Minna Rao executed a Will on 5.7.1990 bequeathing the property allotted to him in the partition deed and they became the absolute owners of that property after the death of Minna Rao. The Will purported to be the last Will of deceased Minna Rao was not a true Will. Minna Rao was suffering from throat cancer and for about three months prior to his date of death he has not in a position to walk or talk properly. He was not having sound disposing mind. The first defendant might have got the Will executed by using coercion and undue influence on Minna Rao. The defendants were residing in the building as licencees on permission granted by the plaintiff and as such the plaintiff is entitled to get a decree of mandatory

injunction directing the defendants to vacate the premises. Plaintiff had revoked the licence and he was entitled to get a declaration of title over the property and mandatory injunction directing the defendants to vacate the premises situated in the property.

3. Defendants filed a written statement admitting that there was partition of the property among the heirs of Madhava Shenoy after his death as per document No.2112. It was also admitted that 5.75 cents of property and a portion of the building situated in the property was allotted to the share of Late Minna Rao as B schedule. 5.75 cents of land was allotted to late Smt.Saraswathi Bai as D Schedule was also admitted. It was contended that on 5.7.1990 Minna Rao executed a Will bequeathing the property allotted to him in the partition deed to the first defendant who was residing with Minna Rao. The Will was duly executed and registered. The first defendant became the absolute owner and he was in possession of 5.75 cents of the property of late Minna Rao. The remaining portion of the building was in the possession of defendants 3 and 4 which falls in the share allotted to Smt. Saraswathi Bai. Defendants 3 and

4 were in possession and occupation of the said land and building as absolute owners, uninterruptedly, openly and continuously against the whole world and prescribed title to the same. The averments contained in para 3 and 4 were denied. The averments that Saraswathi Bai gifted D schedule property obtained by her in the partition deed to the plaintiff and he became the absolute owner in possession of the said property were denied. It was further contended that gift deed was a sham and invalid document and it had not taken effect. The plaintiff was never put in possession. There is no possibility of the plaintiff to get possession over the property as per the gift deed. The plaintiff did not get possession of the property and building covered under the alleged gift deed. He had not accepted the gift during the life time of the donor. The averment that plaintiff renovated the building spending more than Rs.10,000/- was denied. It was contended that since Minna Rao had executed a Will Narayana Shenoy did not get any right, title or interest in the estate of Minna Rao. Narayana Shenoy was incompetent to execute the sale deed. The prayer for mandatory injunction was opposed on the ground that the defendants are

owners of the property. The averment that Minna Rao was not having sound disposing state of mind was denied. It was contended that Minna Rao was mentally and physically fit at the time of execution of Will. The first defendant did not exert any influence on late Minna Rao. It was also contended that Minna Rao was a well known Artist and man of strong will.

4. The trial court found that the plaintiff did not get any title over the property and dismissed the suit. Challenging that decree and judgment this appeal is filed. The following points arise for consideration in this appeal.

- 1.whether the appellant obtained title over 5.75 cents of land entitled to Saraswathi Bai as per Ext.A3 gift deed?
- 2.Whether the Will executed by Minna Rao in favour of 1st respondent was genuine?
- 3.Whether Minna Rao was having sound disposing mind on the date of execution of the Will?
4. Whether the appellant became the owner of 5.75 cents allotted to Minna Rao as B schedule under Ext.A4 sale deed?

5. 23 cents of land originally belonged to Madhava Shenoy. That was enjoyed as a lease hold property. After the

death of Madava Shenoy the 23 cents were partitioned among his widow and children as per partition deed No.2112/1966. B schedule property was allotted to Minna Rao, son of Madhava Sehnoy. D schedule property was allotted to Saraswathi Bai, the widow of Madhava Shenoy. There was an old building which was situated in B and D schedule properties. Admittedly the defendants were residing in the building situated in B and D schedule properties. The report of the Commissioner shows that 3 rooms in that building was in the possession of the plaintiff and that portion form part of B schedule property. The plaintiff claimed title to and possession over D schedule in partition deed on the strength of A3 gift deed executed by Saraswathi Bai.

6. The specific case put forward by the appellant was that he got title to and possession over the plaint schedule properties under Ext.A3 gift deed executed by Saraswathi Bai and under the sale deed executed by Narayana Shenoy. The partition deed as well as Ext.A3 gift deed were executed on the same day. The trial court found Ext.A3 document is an invalid document. It was held that a gift is a compulsorily attestable document and it should have been attested by two witnesses. It

was further found that Ext.A3 was attested by only one attester. The learned counsel appearing for the appellant argued before me that no such contention was raised by the defendants in the written statement. It is argued that Ext.A3 was attested by two witnesses and not by one attester. In the foot of the document after describing the schedule names of witnesses are written. The first attester was none other than Minna Rao. The second attester was the person who prepared the document itself. He was a licensee also. His name was written as the second attester of the document. The reasoning of the court below that he signed the document in his capacity as the scribe alone is not correct. The recital will show that he affixed his signature as an attester and scribe. It is to be noted that he was the father of DW2 who was an attester to the Will executed by Minna Rao. Further the document was presented for registration by Saraswathi Bai herself. The Sub Registrar had made an endorsement to the effect that the document was presented for registration by Saraswathi Bai and she had admitted the execution of document. She was identified by two witnesses. After registration, the gift deed was returned to Saraswathi Bai

herself. In **Pentakota Satyanarayana and Others v. Pentakota Seetharatnam and others (AIR 2005 SC 4362)** Apex Court held that endorsement by Sub Registrar that executant acknowledged the execution before him amounts to due attestation. So in fact in addition to the two witnesses the Sub Registrar's endorsement also amounts attestation. So the findings of the court below that Ext.A3 gift is an invalid document as it was not attested by two attesters is factually wrong.

7. The learned counsel for the respondent contended that even assuming that Ext.A3 gift is not invalid the execution of the same is not properly proved in accordance with the provisions contained in Section 68 of Evidence Act and hence that document cannot be relied on. The evidence on record shows that both the attesters of Ext.A3 gift were not alive on the date when the document was tendered in evidence. In para 5 of the written statement there is no specific denial of execution of Ext.A3 gift. It was contended that the alleged gift deed is a sham and invalid document and that document did not take effect. It was also contended that the 1st respondent never accepted the

gift. In fact by contending that gift was sham document and the donor had not accepted the same the plaintiff had indirectly admitted that gift was executed. In Ext.B3 will relied on the 1st respondent also there is a statement to effect that property allotted to Saraswathi Bai was gifted to the plaintiff under gift deed No.2113 of 1966. PW3 is the brother of Minna Rao. Further the defendants examined DW2 to prove the execution of the Will. He is the son of the second attester to Ext.A3 gift. A2 was shown to him and he had identified his father's signature in A2. Both attesters were dead at the time of trial. One of the witnesses examined by the 1st respondent himself had proved signature of one of the attesters. So the finding of the court below that the execution of Ext.A3 gift is not properly proved is unsustainable.

8. It is argued that the plaintiff never got possession of the property in that gift as he was working from 1957 onwards in Vijayawada and other places. The evidence adduced in the case shows that plaintiff was working as a Stenographer in a Pharmaceutical Company and for 3 years he worked in Vijayawada and thereafter he was working at Ernakulam. It is

not possible to hold that the appellant never got possession of the property as he was working elsewhere. Exts.C1 and C2 are the reports submitted by the Commissioner appointed in this case. In the report Commissioner had reported that the appellant has in possession of 3 rooms in the building situated in the property. Commissioner was examined. During the cross-examination he deposed that it was appellant who opened the lock of the front door and that is the reason why he stated that plaintiff was in possession of three room. So the evidence on record shows that the plaintiff is in possession of the portion of the building. Further the plaintiff had produced the original gift deed from his possession. As I have already stated the endorsement Ext.A3 shows that Sub Registrar returned the gift deed to the executant. The possession of original gift also goes a long way to support the case the plaintiff. In **Kakkacherra v. Chiyyayi (1988 (2) KLT 910)** and **Bhanumathi v. Lalitha Bai (1973 KLT 961)** it was held that only a very little evidence is necessary to come to a conclusion that gift has been accepted. Further the Will relied on by the defendant also supports the case of the appellant. The evidence on records

clearly establishes that the appellant is in possession of a portion of the building situated in D schedule property allotted to Saraswathi Bai in the partition deed.

9. The evidence on record shows that Saraswathi Bai who obtained title over D schedule property gifted the property to the appellant on the same date and gift deed had taken effect. So the finding of the court below that appellant did not get title or possession of 5.75 cents in D schedule is not correct and liable to be set aside. The appellant is entitled to a declaration that he is the owner and in possession of the property subject to the residence of defendants 3 and 4 in a portion of building situated in that property.

10. The next question arising for consideration is whether the title claimed by the plaintiff over 5.75 cents of land included B schedule allotted to Minna Rao is correct.

11. Admittedly, Minna Rao had not executed any document in favour of the plaintiff. According to the appellant the right of Minna Rao devolved upon Narayana Shenoy who sold the same to the appellant under A2 sale deed. The first defendant setup a rival title on the strength of Ext.B3 Will

executed by Minna Rao himself. It is true that Ext.B3 was executed two months prior to the date of death of Minna Rao. The first defendant examined DW2 and 3 to prove the execution of Ext.B3. DWs 2 and 3 gave evidence to the effect that they saw the executant signing the Will and they attested the document with necessary animus to attest the Will. Though DW2 was cross examined at length nothing was brought out to discredit his testimony. DW3 also deposed that he saw the executant signing and the executant saw the attesters attesting the document. The trial court had accepted the evidence of Dws2 and 3. I have also carefully gone through their evidence. I do not find any reason to reject their oral evidence. The first respondent had proved the execution of the Will. So the burden shift to the plaintiff to establish that contention that executant was not having disposing state of mind at the relevant time. To prove that fact the only evidence available is that of PWs 1 and 3. PW1 is the plaintiff. PW3 is Narayana Shenoy. His evidence shows that he was in enimical terms towards the 1st defendant on account of a complaint filed by against him. There is absolutely no other materials to establish that Minna Rao was not having disposing

mind. Even according to the plaintiff Minna Rao was suffering from throat cancer. That alone is not sufficient to hold that on the date of execution of Ext.B3 Minna Rao was not having disposing mind at all. Further Ext.B3 document shows that it was presented for registration by the executant himself before the Sub Registrar. Sub Registrar had made an endorsement that the executant had admitted the execution. In view of the principles laid down in Pentakota Sathya Narayana's case (supra) the endorsement by Sub Registrar amounts to proof of execution of the document. So there is no evidence to hold that Minna Rao was not in a position to know the nature and consequence of his acts on account of his illness.

12. According to the appellant the signature contained in Ext.B3 was not affixed by executant but it is a fabricated one. In fact the Will was sent to the expert for comparison of the disputed signatures with the admitted signatures. But the expert did not compare that signatures with admitted signatures for the reason that sufficient admitted signatures were not available. The court itself had compared the disputed signatures in the Will with the admitted signatures and came to a conclusion that the

disputed signatures were affixed by Minna Rao himself. In view of the other evidence available in this case the opinion formed by the court by the comparison of the disputed signatures with admitted signatures by this Court can also be relied on to decide the issue. So defendants had successfully discharged the burden cast on them to prove the due execution of the Will. So findings of the court below that Will is genuine document and had taken effect is correct. The further findings that nothing was left for Narayana Shenoy to inherit is also correct and only to be confirmed. So appellant will not get any tile over the 5.75 cents of land allotted as B schedule to Minna Rao on account of the sale deed executed by Narayana Shenoy.

13. The pleadings and evidence in the case shows that the appellant is the owner of 5.75 cents of property allotted to Saraswathi Bai under D schedule in the partition deed. But he did not get any title to or possession over 5.75 cents of property allotted to Minna Rao as D schedule in the partition deed.

14. The plaintiff had claimed damages for use and occupation. It is admitted that before and after the partition all parties who residing in the building. The case of the appellant

that it was he who permitted the defendants to reside in the building is not established. So the appellant is not entitled to get amount by way of damages for use and occupation.

In the result the appeal is allowed in part. The decree and judgment passed by the court below so far as it relates to the property covered by A3 gift is set aside. The title and possession of the plaintiff over 5.75 cents of land allotted to Saraswathi Bai as D schedule in the partition deed is declared. He is allowed to recover the building portion situated in that plot from the defendants. The defendants are given three months time to vacate from the building portion situated in that area. In case they fail to surrender possession it is open to the appellant to execute decree to get possession of building from the defendant. The claim for damages is rejected. The prayer of the plaintiff for a declaration that he is the owner of 5.75 cents of land and building portion allotted to Minna Rao is rejected. The suit so far as it relates to that properties is dismissed. No costs.

K.PADMANABHAN NAIR, JUDGE

dvs